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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2029

GREGG C. REVELL;
ASSOCIATION OF NEW JERSEY RIFLE &
PISTOL
CLUBS INC.

v.

PORT AUTHORITY OF NEW YORK AND NEW
JERSEY; SCOTT ERICKSON

v.

PORT AUTHORITY OF NEW YORK AND NEW
JERSEY,

Third Party Plaintiff

v.

CONTINENTAL AIRLINES; COUNTY OF ESSEX;
ESSEX COUNTY JAIL; ESSEX COUNTY
PROSECUTOR; JOHN DOES 1-10,

Third Party Defendants

Gregg C. Revell,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 06-cv-402)
District Judge: Honorable Katherine S. Hayden

Argued
January 26, 2010

Before: RENDELL and JORDAN, *Circuit Judges*, and PADOVA*, *District Court Senior Judge*

(Filed: March 22, 2010)

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OPINION OF THE COURT

JORDAN, Circuit Judge.

Gregg C. Revell appeals from the dismissal of his claims, brought pursuant to 42 U.S.C. § 1983, seeking to impose liability upon the Port Authority of New York and New Jersey ("Port Authority") and Port Authority Police Officer Scott Erickson for arresting him under New Jersey's gun laws and seizing his firearm and ammunition. According to Revell, his arrest was unlawful because he was in compliance with a provision of the Firearm Owners' Protection Act ("FOPA"), 18 U.S.C. § 926A, which allows gun owners licensed in one state to carry firearms through another state under certain circumstances. Because we conclude that, at the time of his arrest, Revell's conduct did not bring him within the protection of that statute, we will affirm both the dismissal of his § 926A-based claim and the grant of summary judgment to the Port Authority and Erickson on Revell's closely related Fourth Amendment claim. We will likewise

affirm the grant of summary judgment against Revell on his due process claim under the Fourteenth Amendment.

I. Background

A. Revell's Arrest

On March 31, 2005, Revell, a resident of Utah, embarked on a flight from Salt Lake City to Allentown, Pennsylvania, via Minneapolis/St. Paul and Newark, New Jersey. When he arrived at the Northwest Airlines counter[1] in the Salt Lake City Airport, he checked his luggage through to his final destination and declared that, in the luggage, he was carrying an unloaded firearm contained in a locked hard case and ammunition in a separate locked hard case. He signed an orange firearm declaration tag, which was placed inside the locked hard case containing the firearm. That was apparently the last thing on the trip that went as expected. The several mishaps that followed ultimately relate to the accessibility of the firearm and ammunition and are thus key to this dispute.

Because his flight into Newark was late, Revell missed his connection from Newark to Allentown. He booked the next flight to Allentown, which was scheduled to leave Newark at 8 p.m. that evening, but, after the airline changed arrangements, the passengers scheduled for that flight were asked to

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[1] While the record is not entirely clear, it appears that Northwest and Continental Airlines had some shared responsibility for transporting Revell to Allentown

board a bus, instead of a plane, headed for Allentown. Revell got on the bus; however, when he learned that his luggage was not on board, he got off to locate it.[2] By the time he retrieved his luggage, he had missed the bus, and no other connections to Allentown were available. He then went directly to the Newark Airport Sheraton Hotel in a hotel shuttle, taking his luggage with him. The driver of the shuttle van placed Revell's luggage, which contained the locked hard case containers, in the rear storage area of the van, which was not immediately accessible from the passenger compartment where Revell was seated. Revell stayed at the hotel overnight but did not open either of the locked containers during his stay.

The next morning, he took the hotel's airport shuttle back to the Newark Airport and, again, his luggage was placed out of his reach in the rear of the shuttle. Upon arriving at the airport around 8:30 a.m., he proceeded to the ticket counter to check his luggage and declared that he was carrying an unloaded firearm in a locked hard case and ammunition in a separate locked hard case. Revell was told to take his luggage to the Transportation Security Administration ("TSA") area so that it could be x-rayed. After the luggage went through the x-ray machine, the TSA agent at the other end of the machine took the hard cases out and asked Revell for the key to them, which Revell provided. The TSA agent opened the cases using Revell's key and

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[2] In a triple-whammy for Revell, not only had the airline made him miss his connection and then put him on a bus instead of a plane, a Northwest employee had mistakenly checked his luggage to Newark, instead of Allentown, as his final destination

removed the firearm and ammunition. The orange declaration sheet from Salt Lake City was still in the case with the firearm.

About twenty minutes later, several Port Authority officers, including Officer Erickson, escorted Revell to an area away from other passengers where they questioned him about the firearm and ammunition. Revell explained that he had declared his weapon and ammunition, and that he was merely passing through New Jersey en route to Allentown, Pennsylvania. He also showed the officers his Utah concealed firearm permit and his driver's license. When Erickson questioned Revell about why he had the firearm, Revell explained that he was traveling to Pennsylvania to pick up a car to bring back to Utah and that "he was going to need the weapon for protection" as he drove the car home. (App. at 33.) Revell also informed Erickson that, upon missing his flight the day before, he had taken possession of his bag with the firearm in it and had gone to a hotel in Newark to stay for the night. Erickson asked Revell whether he had authority to carry the firearm in Pennsylvania, but Revell did not respond.[3]

Erickson arrested Revell for possession of a handgun without a permit in violation of N.J. Stat. Ann. § 2C:39-5(b) and for possession of hollow-point

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[3] At his deposition, Revell stated that he did not check to make sure that he could carry his firearm in Pennsylvania prior to traveling there, but believed that it was legal for him to carry a weapon there because the instructor for his concealed firearm permit class did not mention that he could not do so.

ammunition in violation of N.J. Stat. Ann. § 2C:39-3(f).[4] Revell was handcuffed, held overnight at the Port Authority jail, and then transferred to the Essex County, New Jersey, Jail, where he was incarcerated for three days until he was released on bond. Four months later, on August 2, 2005, the Essex County prosecutor administratively dismissed all of the charges against him. However, Revell's firearm, ammunition, holster, locks, and hard cases, which were seized at the time of his arrest, were not returned until July 24, 2008, more than two years after the ill-fated trip and approximately a year after he filed his amended complaint in this action.

B. Revell's Complaint

Understandably troubled about his and his property's treatment, Revell brought the present § 1983 case, alleging that the Port Authority and Erickson had violated his rights under § 926A of FOPA.[5] In essence, § 926A allows a person to

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[4] Section 2C:39-5(b) provides that "[a]ny person who knowingly has in his possession any handgun, .. without first having obtained a permit to carry the same as provided in N.J.S 2C.58-4, is guilty of a crime" of the second or third degree depending on the nature of the handgun. Section 2C:39-3(f) provides that "[a]ny person, who knowingly has in his possession any hollow nose or dum-dum bullet, . is guilty of a crime of the fourth degree ."

[5] Additionally, the Association of New Jersey Rifle & Pistol Clubs, Inc. brought a § 1983 claim based on 18 U.S.C. § 926A, seeking to enjoin the Port Authority from enforcing against the Association's non-resident members the New Jersey statutes under which Revell was arrested. The District Court found that

transport a firearm and ammunition from one state through a second state to a third state, without regard to the second state's gun laws, provided that the traveler is licensed to carry a firearm in both the state of origin and the state of destination and that the firearm is not readily accessible during the transportation.[6] 18 U.S.C. § 926A. Revell also alleged that the appellees violated his Fourteenth Amendment rights by retaining his firearm, holster, locks, containers and ammunition, thereby depriving him of his property without due process. He sought damages and an injunction requiring the Port Authority to return his property.

C. The District Court's Dismissal of Revell's Complaint

Erickson moved to dismiss Revell's claims and the Port Authority moved for judgment on the pleadings.[7] They argued, among other things, that probable cause existed for the arrest because § 926A

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the Association lacked standing and dismissed its claim. The Association appealed that ruling to our Court and we reversed, holding that the Association did, in fact, have standing to pursue its claim on behalf of its members. *Revell* v. *Port Auth. of N.Y. & N.J.*, 321 F App'x 113, 117 (3d Cir.2009). The Association's lawsuit is not at issue in this appeal.

[6] The text of § 926A is set forth in section III A, *infra*.

[7] Since the Port Authority had already answered Revell's complaint, it moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), while Erickson, who had not answered the complaint, moved to dismiss for failure to state a claim under Rule 12(b)(6).

was inapplicable, given Revell's overnight stay in New Jersey. They also argued that Erickson was entitled to qualified immunity.

The District Court noted that its first task was to "determine whether 18 U.S.C. § 926A created an enforceable personal right," an issue of first impression. (App. at 44.) The Court answered that question by holding that, pursuant to the Supreme Court's decision in *Graham* v. *Connor*, 490 U.S. 386 (1989), Revell was required to frame his § 1983 claim in terms of the Fourth Amendment, as opposed to § 926A, because he sought damages for an allegedly improper arrest. In other words, the Court concluded that, "[b]ecause individuals already have a method of recovering damages pursuant to § 1983 if they are arrested or charged without probable cause, [i.e., a claim under the Fourth Amendment,] it is unnecessary and, indeed, improper ... to conclude that § 1983 provides a separate or alternative remedy for a violation of § 926A." (App. at 49.) The Court thus dismissed Revell's § 1983 claim for the alleged violation of § 926A, but it granted him leave to file an amended complaint stating a Fourth Amendment claim.

The Court also dismissed Revell's procedural due process claims for damages and injunctive relief.[8] The Court, relying on *Parratt* v. *Taylor*, 451 U.S. 527

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[8] The District Court analyzed Revell's due process claims to determine whether he had also pled a substantive due process violation and concluded that he had not. That issue is not on appeal

(1981), explained that, if constitutionally adequate state procedures were available to remedy the deprivation of Revell's property, he could not succeed on his due process claim. Since Revell neither availed himself of state law remedies nor explained why those remedies would be futile or constitutionally inadequate, the Court dismissed that claim. However, it granted Revell leave to amend his complaint to allege that "the Port Authority's postdeprivation remedies for the return of seized property are constitutionally inadequate." (App. at 53.)

On June 29, 2007, the District Court entered an order dismissing Revell's complaint and allowing him leave to amend pursuant to the memorandum opinion.

D. Revell's Amended Complaint

Not long after, on July 13, 2007, Revell filed an amended complaint against the Port Authority and Erickson. In the first count, he asserted that his arrest and the seizure of his property violated his Fourth Amendment rights because, pursuant to § 926A, he was legally entitled to carry the firearm and ammunition in his luggage, notwithstanding New Jersey law. Revell also asserted two procedural due process claims-one for damages and one for injunctive relief requiring the return of his property-based on allegations that the Port Authority "has no post-deprivation procedure for Revell to recover the [property] seized from him" and that the defendants "did not provide him notice of the basis for the retention of the property and of an opportunity for a post-deprivation hearing." (App. at 64.) He later

voluntarily dismissed his due process claim for injunctive relief, after his property was returned to him.

E. The District Court Grants Summary Judgment on Revell's Claims

Following discovery, the Port Authority and Erickson moved for summary judgment, arguing that probable cause supported Revell's arrest and that Erickson is protected by qualified immunity. They asserted that § 926A did not immunize Revell from arrest for violating New Jersey's gun laws because, contrary to an express requirement of § 926A, Revell's weapon was readily accessible to him during his stay in New Jersey. They also moved for summary judgment on Revell's due process claim, arguing that New Jersey has in place adequate post-deprivation procedures for those who seek the return of property seized upon arrest, including state tort remedies, and that Revell failed to avail himself of any of those procedures.

The District Court held that the Port Authority and Erickson were entitled to summary judgment on the Fourth Amendment claim, "because probable cause [for the arrest and property seizure] developed during ... [Erickson's] questioning concerning Revell's transportation of a handgun and ammunition through New Jersey." (App. at 78.) The Court found persuasive the defense argument that Revell's conduct fell outside § 926A since it is undisputed that Revell left the airport with his luggage for an overnight stay at a hotel in New Jersey, thus giving him ready access to

the gun during that period. The Court also explained that " § 926A does not address anything but vehicular travel; it does not encompass keeping the weapon-locked in a case or not-in an airport hotel overnight." (App. at 77.) Alternatively, the Court held that Erickson was entitled to qualified immunity because probable cause existed for Revell's arrest and, therefore, no constitutional right was violated. The District Court also concluded that summary judgment against Revell on his due process claim was proper because he had failed to take advantage of available state remedies for the return of his property, namely, a state court lawsuit.[9]

In a March 31, 2009 order, the District Court granted the summary judgment motion in accordance with its memorandum opinion. Revell timely appealed both the summary judgment order and the order dismissing his original complaint.

II. Standard of Review[10]

Our review of the District Court's decision to grant the Port Authority's motion for judgment on the pleadings and Erickson's motion to dismiss is plenary. See *E.I. DuPont de Nemours & Co.* v. *United States*, 508 F.3d 126, 131 (3d Cir.2007); *DeHart* v. *Horn*, 390

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[9] The Court noted that Revell's property was apparently returned to him after he made "a simple request to Essex County." (App. at 81.)

[10] The District Court had jurisdiction over Revell's claims pursuant to 28 U.S C. §§ 1331 and 1343. Our jurisdiction is based upon 28 U.S.C § 1291.

F.3d 262, 272 (3d Cir.2004). A court confronted with a Rule 12(b)(6) motion must accept the truth of all factual allegations in the complaint and must draw all reasonable inferences in favor of the non-movant. *Gross* v. *German Found. Indus. Initiative*, 549 F.3d 605, 610 (3d Cir.2008). A motion for judgment on the pleadings based on the defense that the plaintiff has failed to state a claim is analyzed under the same standards that apply to a Rule 12(b)(6) motion. *Turbe* v. *Gov't of the V.I.*, 938 F.2d 427, 428 (3d Cir.1991).

We also exercise plenary review over an appeal from a grant of summary judgment. *Jacobs Constructors, Inc.* v. *NPS Energy Servs., Inc.*, 264 F.3d 365, 369 (3d Cir.2001). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. (citing FED.R.CIV.P. 56(c)). "In making this determination, we must consider the evidence in the record in the light most favorable to the nonmoving party." *Id.*

III. Discussion

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West* v. *Atkins*, 487 U.S. 42 , 48 (1988). There is no question that the defendants in Revell's suit were acting under color of state law when effecting his arrest. The issue is whether Revell has alleged a violation of any right under federal law. Revell's § 1983 claims seek to

remedy perceived violations of his alleged statutory right under § 926A, his Fourth Amendment rights, and his Fourteenth Amendment due process rights.[11] We will first address the § 926A claim and the Fourth Amendment claim, before turning to the due process claim.

A. Section 926A and the Fourth Amendment

Revell challenges both the District Court's dismissal of his § 926A claim and the Court's grant of summary judgment on his Fourth Amendment claim. He asserts that he never should have been required to re-frame his § 926A claim in terms of the Fourth Amendment, since, as he sees it, § 926A provides a federal right that may be remedied by way of § 1983, independent of the Fourth Amendment. As to his Fourth Amendment claim, Revell asserts that the District Court erred in concluding that probable cause existed for his arrest. More specifically, and returning to the same § 926A theme, he says that the District Court incorrectly determined that he did not fall within the protection provided by that statute. Revell does not dispute that his conduct violated New Jersey law but instead claims that he was not subject to arrest because he complied with § 926A and that § 926A preempts New Jersey's gun laws under the

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[11] For ease of reference, we will refer to those § 1983 claims as Revell's § 926A claim, his Fourth Amendment claim, and his due process claim.

circumstances presented here.[12] He also challenges the District Court's conclusion that Erickson was entitled to qualified immunity against the Fourth Amendment claim.

In order for Revell to prevail either on the theory that he had a right under § 926A that can be remedied through § 1983 or on the theory that the Fourth Amendment should have protected him from arrest because § 926A gave him a right to transport his gun, he must first establish that he complied with the conditions set forth in § 926A so as to be entitled to its protection. Accordingly, we begin our analysis with the question of whether Revell was in compliance with § 926A when he was arrested in New Jersey.

Section 926A of FOPA, entitled "Interstate transportation of firearms," provides:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise

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[12] Section 927 of Title 18, captioned "Effect on State law," provides:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

> prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A. It is clear from the statute that a person transporting a firearm across state lines must ensure that the firearm and any ammunition being transported is not "readily accessible or ... directly accessible from the passenger compartment of [the] transporting vehicle." *Id.* Looking solely at the allegations of Revell's original complaint, it is also clear that what happened here does not fall within § 926A's scope because his firearm and ammunition were readily accessible to him during his overnight stay in New Jersey.

Revell attempts to invoke the protection of the

statute by alleging that "[d]uring the transportation of the firearm, neither the firearm nor the ammunition were readily accessible or directly accessible from the passenger compartment of the aircraft or the bus [that he took to the hotel]." (App. at 25.) But only the most strained reading of the statute could lead to the conclusion that having the firearm and ammunition inaccessible while in a vehicle means that, during the owner's travels, they can be freely accessible for hours at a time as long as they are not in a vehicle. The complaint reveals that Revell's luggage containing the firearm was, in fact, available to him while he was at the hotel. He alleged that, "[a]fter retrieving his bag, because there were no more connections to Allentown until 9:45 a.m. the following morning ..., [he] went directly to, and stayed the night at, the Airport Sheraton Hotel." (App. at 23.) He further alleged that he returned with his luggage directly to the airport the next day and that a TSA agent, after x-raying the luggage, opened it with a key that Revell gave him. Taking those facts as true, it is clear that the gun and ammunition were readily accessible to Revell during his stay in New Jersey and, thus, by the allegations of his own complaint, he was not within the scope of § 926A. Dismissal of the § 926A claim was therefore proper.[13]

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[13] The District Court dismissed Revell's § 926A claim based upon its conclusion that Revell was required to bring that claim pursuant to the Fourth Amendment. But, we "may affirm a result reached by the district court on reasons that differ so long as the record supports the judgment." *Johnson* v. *Orr*, 776 F 2d 75, 83 n. 7 (3d Cir 1985). Based solely on the allegations of the complaint, it is clear that Revell did not comply with § 926A, so we can affirm the District Court's dismissal on that basis alone.

Turning to the summary judgment motion on Revell's Fourth Amendment claim, the depositions filed in support of that motion serve to confirm the conclusion that Revell had access to his gun and ammunition, contrary to § 926A's requirement.[14] Erickson testified that, under questioning, Revell said he had been forced to stay overnight at a hotel in Newark because he had missed his flight. Erickson also testified that Revell acknowledged he "had the firearm with him when he left for Newark, that he had picked up the bag and taken it with him." (App. at 33.) Specifically, Erickson testified as follows:

> Q: He told you that he picked up the bag at Newark because he missed his flight, and went out of the airport, correct?
>
> A: Yes.
>
> Q: And did he tell you that he went to a hotel that night?
>
> A: Yes.

Given our disposition, we do not address the more difficult question of whether, if he had complied with § 926A, Revell would have been able to pursue a § 1983 claim based upon § 926A

[14] Revell's amended complaint, which contains his Fourth Amendment claim, alleges the same facts as his original complaint, with the addition of one new allegation-that Revell did not open either of the locked hard cases while he was in New Jersey The amended complaint also described in greater detail the inaccessibility of the luggage during the shuttle ride to and from the airport to the hotel.

(*Id.*) Revell's own deposition further confirms that, upon missing his flight to Allentown, he retrieved his luggage, took a shuttle to a nearby hotel, and then returned to the airport the following morning with his bags.

Revell thus had access to his firearm and ammunition during his stay at the New Jersey hotel, whether or not he in fact accessed them and regardless of whether they were accessible while he was traveling by plane or van. That crucial fact takes Revell outside the scope of § 926A's protection, as the District Court correctly noted.[15] (App. at 77 ("[N]othing in the

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[15] With regard to whether probable cause existed for his arrest, Revell attempts to raise factual disputes concerning what Erickson knew at the time he arrested Revell, arguing that Erickson did not know what Revell did with his bag when he went to the hotel and that Erickson did not know whether he stayed overnight. First, Revell mischaracterizes the record, as Revell himself testified that he told the officers that he "had been forced to stay in the hotel." (App. at 37.) Second, even if Erickson were required to consider § 926A's impact in his probable cause analysis, an issue on which we express no holding, Revell told Erickson that he had picked up his luggage from the airport and went to a hotel for the night. A reasonable officer would be entitled to infer from Revell's statements that he had access to his firearm and ammunition while at the New Jersey hotel. Whether Revell in fact accessed them is irrelevant. Given our conclusion that Revell was not protected by § 926A when he was arrested in New Jersey, we need not address the interrelation between § 926A and probable cause. We do, however, note our concern with the implications of Revell's argument that § 926A requires an officer to "investigate the laws of the jurisdiction from which the traveler was traveling and the laws of the jurisdiction to which the traveler was going" prior to making an arrest. (Appellant's Reply Br. at 13.) It seems doubtful that, in passing § 926A, Congress

pleadings or the record indicates that Revell's handgun and ammunition were anything but readily accessible to him during his overnight stay in New Jersey.").) Accordingly, Revell was subject to arrest for violating New Jersey's gun laws.[16] We will therefore affirm the District Court's grant of summary judgment on his Fourth Amendment claim.[17]

Although we conclude that Revell fell outside of § 926A's protection during his stay in New Jersey, we recognize that he had been placed in a difficult predicament through no fault of his own. However, Section 926 clearly requires the traveler to part ways with his weapon and ammunition during travel; it does not address this type of interrupted journey or what the traveler is to do in this situation. Stranded gun

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intended to impose upon police officers such a potentially burdensome requirement. See *Torraco* v. *Port Auth. of N.Y. & N.J.*, 539 F.Supp.2d 632, 644 (E.D.N.Y 2008) ("[I]t is simply too much to read into § 926A a Congressional intent to require local police to have on-the-spot knowledge of the firearms laws of all 50 States.").

[16] To satisfy the Fourth Amendment, a warrantless arrest must be based on probable cause that a crime has been or is being committed. *Devenpeck* v *Alford*, 543 U.S. 146, 152 (2004), see also *United States* v. *Stubbs*, 281 F.3d 109, 122 (3d Cir.2002). There is no question that Erickson observed Revell in possession of a firearm and hollow-point bullets in violation of New Jersey law.

[17] Because we conclude that Revell's weapon and ammunition were readily accessible to him, we need not address Revell's argument that § 926A should be broadly construed to "immunize[ ] non-vehicular transportation if the firearm is not readily accessible." (Appellant's Op. Br. at 32.) Nor do we reach the issue of qualified immunity

owners like Revell have the option of going to law enforcement representatives at an airport or to airport personnel before they retrieve their luggage. The careful owner will do so and explain his situation, requesting that his firearm and ammunition be held for him overnight.[18] While this no doubt adds to the inconvenience imposed upon the unfortunate traveler when his transportation plans go awry, it offers a reasonable means for a responsible gun owner to maintain the protection of Section 926 and prevent unexpected exposure to state and local gun regulations.

B. Due Process

Revell also asserts that the District Court erroneously granted summary judgment on his due process claim. In order to determine whether an individual has been deprived of his property without due process "it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon* v. *Burch*, 494 U.S. 113, 126 (1990). "This inquiry ... examine[s] the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." Id. Although a pre-deprivation hearing is generally required before a state seizes a

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[18] Of course, this suggestion leaves unanswered the question of what the gun owner should do if the law enforcement officers decline to assist him. It may be hoped, however, that officers will not compound a blameless owner's problems in that way.

person's property, "[i]n some circumstances ... the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." Id. at 128.

For example, in *Parratt* v. *Taylor*, and thereafter in *Hudson* v. *Palmer*, the Supreme Court held that, when a state officer randomly and without authorization departs from established state procedures, the state need only provide post-deprivation procedures. *Hudson*, 468 U.S. 517, 533 (1984); *Parratt*, 451 U.S. 527, 543 (1981), *overruled in part on other grounds*, *Daniels* v. *Williams*, 474 U.S. 327 (1986) (overruling *Parratt* to the extent it suggested that a constitutional injury could be established based on negligence). The Supreme Court held in *Parratt* that a state tort claim was an adequate remedy for a prisoner aggrieved by prison officials' negligent loss of his property, and in *Hudson* the Court held the same with respect to a prisoner whose property was intentionally destroyed by a prison guard.

The District Court relied on *Parratt* in deciding that Revell's failure to take advantage of available remedies, namely a state court lawsuit, warranted summary judgment on his due process claim. Revell argues that, because his deprivation was made pursuant to Port Authority policy as opposed to an unauthorized act, a state tort remedy is insufficient and that, instead, "there must be a statutory provision for a post-deprivation hearing to satisfy due process." (Appellant's Op. Br. at 25.) But, Revell's due process

claim is not based on defendants' initial seizure of the property. Instead, in his opening brief, Revell clarified that his claim rests on the defendants' retention of his property after the charges against him had been dismissed and on their failure to provide him notice and an opportunity for a post-deprivation hearing. (Appellant's Op. Br. at 26 ("Revell should not have been deprived of the property after August 2, 2005 without being provided constitutionally adequate notice and an opportunity for a post-deprivation hearing.").) Revell has identified no policy requiring officers of the Port Authority to retain property that is no longer needed for a prosecution, and it is highly unlikely that any such policy exists. Accordingly, the rationale of *Parratt* and *Hudson* does apply. See *Case* v. *Eslinger*, 555 F.3d 1317, 1331 (11th Cir.2009) ("We have recognized that a civil cause of action for wrongful conversion of personal property under state law is a sufficient postdeprivation remedy when it extends to unauthorized seizures of personal property by state officers." (internal quotations omitted)).

Revell cannot prevail on his due process claim if the state's post-deprivation procedures, including state tort remedies, are adequate. He has failed to explain why New Jersey's state procedures to recover wrongfully seized property, such as the ability to move in the criminal action for return of his property or the ability to file a separate action for a writ of replevin, are insufficient. See *State* v. *One* 1986 Subaru, 576 A.2d 859, 318 (N.J.1990) (explaining that owner of seized property can file a replevin action or move to retrieve improperly seized property and "[b]ecause of the availability of [such] procedures ..., a claimant's

inaction may weigh against a claim that his or her due-process rights have been violated"); see also N.J. Rule 3:5-7 (motion for return of property)[19] and 4:61-1 (replevin). Nor has Revell shown any entitlement to special notice of those procedures. See *City of W. Covina* v. *Perkins*, 525 U.S. 234, 236 (1999) (holding that due process clause does not "require [ ] a State or its local entities to give detailed and specific instructions or advice to owners who seek return of property lawfully seized but no longer needed for police investigation or criminal prosecution"). Thus, his due process claim fails and summary judgment was warranted. *Cf. Mora* v. *City of Gaithersburg*, 519 F.3d 216, 230 (4th Cir.2008) (rejecting plaintiff's procedural due process claim, when police retained plaintiff's weapons after seizing them because "[plaintiff] has had, and continues to have, notice and an opportunity to be heard in Maryland, and he cannot plausibly claim that Maryland's procedures are unfair when he has not tried to avail himself of them.").

IV. Conclusion

Section 926A does not apply to Revell because his firearm and ammunition were readily accessible to him during his stay in New Jersey. That conclusion is fatal to his § 926A claim and the associated Fourth

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[19] Although Rule 3 5-7 directly speaks to the ability of a defendant to move for the return of property that was unlawfully seized, which Revell could have done in light of his claim that his arrest and the seizure of his property were unlawful, Revell may well have found a New Jersey court sympathetic to a motion under that Rule for the return of his property once the charges against him were dropped

Amendment claim. We accordingly affirm the District Court's dismissal and grant of summary judgment, respectively, on those claims. We also affirm the District Court's grant of summary judgment on Revell's due process claim because he did not take advantage of state procedures available to him for the return of his property.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GREGG C. REVELL,

Plaintiff,

v.

Civ. Action
No. 06-402 (KSH)

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and SCOTT ERICKSON,

Defendants and Third-Party Plaintiff

OPINION

v.

CONTINENTAL AIRLINES, THE COUNTY OF ESSEX, THE ESSEX COUNTY JAIL, THE OFFICE OF THE ESSEX COUNTY PROSECUTOR et al.

Third-Party Defendants.

KATHARINE S. HAYDEN, U.S.D.J.

This action arises from the arrest and subsequent detention of plaintiff Gregg C. Revell at Newark Liberty Airport ("Newark Airport") on April 1, 2005. The following motions are before the Court in this matter. Defendants Port Authority of New York and New Jersey ("Port Authority") and Police Officer Scott Erickson ("Erickson") (collectively, "Port Authority defendants") have moved for summary judgment dismissing the complaint against them. (D.E.93.) Third-Party Defendants, the County of Essex and the Essex County Prosecutor's Office (collectively, "Essex County"), have moved to dismiss in lieu of answering the third-party complaint asserted against them by Third-Party Plaintiffs Port Authority and Erickson. (D.E.92.) Third-Party Defendant Continental Airlines ("Continental") has moved for summary judgment of dismissal as to the Port Authority's third-party complaint against it. (D.E. 97, 106.) In this opinion, the Court addresses all pending motions.

I. FACTUAL BACKGROUND

Because the relevant facts were stated in an earlier decision, and are essential to understanding Revell's claims, they are recited here.

> On March 31, 2005, Revell, a resident of Utah, checked in with Northwest Airlines at the Salt Lake City Airport. His destination was Allentown, Pennsylvania, via Minneapolis/St. Paul and Newark, New Jersey. When he

checked in, Revell declared that his bag contained an unloaded firearm in a locked hard case container and ammunition in a separate locked hard case container. Revell signed an orange firearm declaration tag, which was placed inside the container holding the firearm.

Revell's flight to Newark was late and he missed his connecting flight to Allentown. After waiting five hours inside the secure area of the airport, he was directed to board a bus that would drive him and other passengers to Allentown. After taking his seat on the bus, Revell learned from the driver that his checked luggage had not been placed on the bus, so he got off to search for his bag. By the time Revell found it in the lost luggage area of Newark Airport, the bus to Allentown had already left. An airline employee told him that the airline?s computer system showed that although he had checked the bag through to Allentown, the airline had mistakenly tagged his bag with Newark as its final destination. As there were no other connections to Allentown that night, Revell took his bag and stayed overnight at a nearby hotel.

The next morning, Revell went directly to Newark Airport. At the airline

check-in counter, he once again declared that he had a firearm and ammunition in his bag and that they were stored in separate locked hard case containers. Revell signed a white form and was directed to an x-ray area, where he again declared the firearm and ammunition. After his bag went through the x-ray machine, an agent at the end of the machine opened the cases using Revell's key. The orange firearm declaration from Revell's Salt Lake City check-in was still in the firearm container. After approximately 20 minutes, several police officers escorted Revell to a different area of the airport where they questioned hi m about the firearm and ammunition. Revell showed them his Utah concealed firearm permit and driver?s license, and explained that he was simply traveling through New Jersey from Utah and that he was on his way to Pennsylvania.

It is unclear exactly when Officer Scott Erickson appeared on the scene, but he ultimately arrested Revell for possession of a handgun without a permit in violation of N.J.S.A. § 2C:39-5(b) and for possession of hollow point ammunition in violation of N.J.S.A. § 2C:39-3(f). Revell's firearm, ammunition, holster, locks, and hard case containers were seized, and he was charged with unlawful possession of a handgun

> without a permit and unlawful possession of hollow point ammunition. He was handcuffed, placed in a police car, and held overnight in the Port Authority jail. The next day, Revell was transported to the Essex County Jail, where he was detained for three days. Ultimately, some four months later, on August 2, 2005, the Essex County Prosecutor administratively dismissed all charges. As of the date of filing the complaint, the firearm, ammunition, holster, locks, and hard case containers had not been returned.

(Op. dated June 29, 2007 (D.E.38)). On June 29, 2007, the Court granted Port Authority defendants' motion to dismiss Count One of Revell's original complaint, which sought to recover monetary damages and injunctive relief pursuant to 42 U.S.C. § 1983 for a violation of a statutory right secured by 18 U.S.C. § 926A, concluding that § 926A did not create a private right of action. (D.E. 38.) At the same time, the Court permitted Revell to amend his complaint "to state a § 1983 claim for an unreasonable arrest and seizure of property in violation of the Fourth Amendment." (D.E.38.) The Court also dismissed Counts Two and Three, which claimed that defendants, acting under color of State law, had deprived him of his property (firearm, ammunition, holster, locks, and hard case containers), without due process of law as guaranteed by the Fourteenth Amendment and sought redress in the form of monetary relief (Count Two) and injunctive relief (Count Three). (D.E.38.) The Court granted leave

for Revell to reframe these counts as "a claim alleging that the Port Authority's post-deprivation remedies for the return of seized property are constitutionally inadequate." (D.E.38.) The Court also dismissed Count Four, which had been brought by the Association of New Jersey Rifle and Pistol Clubs, Inc. (the "Association"), finding that the Association's claim to enjoin defendants from enforcing N.J.S.A. §§ 2C:39-5(b) (possession of a handgun without a permit) and 2C:39-3(f) (possession of hollow point ammunition) against its non-resident members transporting a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A "d[id] not meet Article III's injury in fact requirement to establish an actual case or controversy." (D.E.38.) On September 7, 2007, the Association filed a notice of appeal of its dismissal as a plaintiff. (D.E.64.)

Revell timely filed an amended complaint, recasting Claims One, Two and Three as permitted by the Court, and the Association dropped Claim Four, as ordered. (D.E.46.) In the amended complaint, Count One asserts a § 1983 claim for damages pursuant under the Fourth Amendment. Count Two pleads a claim for damages, alleging that Port Authority deprived Revell of his property without due process of law. Count Three, which Revell has since voluntarily dismissed,[1] sought injunctive relief for the same alleged due process violations. In the new complaint, Revell supplements paragraph 12 of his original complaint regarding his transportation to the airport

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[1] Revell advised the Court on July 24, 2008 that the Port Authority returned his property. (D.E 101)

Sheraton (corresponds to ¶ 11 in the amended complaint), as follows:

> His bags (including both locked hard case containers) were placed in the rear, baggage area of the van by the driver of the hotel shuttle van. The bags were not readily or directly accessible from the passenger compartment of the hotel shuttle van as there were two seats between him and the bags and he would have had to climb over the rear seat to get to the bags.

(Am.Compl.¶ 11.)

A final pretrial order was entered on September 28, 2007. (D.E.70.) Essex County filed its motion to dismiss in lieu of answering on June 11, 2008, followed by Port Authority defendants' cross-motion for summary judgment on June 13, 2008. Continental thereafter moved on August 8, 2008 for summary judgment as to the third-party complaint.[2]

II. STANDARD OF REVIEW

Port Authority defendants' motion, as well as Continental's motion, are made pursuant to Rule 56(c), Fed.R.Civ.P. Summary judgment may be granted "if

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[2] A third-party action was brought by Port Authority against Essex County and Continental, essentially alleging that Continental's malfeasance was the proximate cause of any injury to Revell. (D.E.55)

the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must "view the facts in the light most favorable to the non-moving party and [must] draw all inferences in that party's favor." *Gray v. York Newspapers*, 957 F.2d 1070, 1080 (3d Cir.1992). Summary judgment is inappropriate if there is evidence sufficient to allow a reasonable jury to return a verdict for the non-moving party, see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), or if the factual dispute is one which might affect the outcome of the suit under the governing law ...." Id. The movant's burden, however, "may be discharged by 'showing' ... that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Additionally, the non-movant "may not rest upon mere allegations or denials of the ... pleading"; instead, the non-movant, "by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Here, the facts necessary to the determination of the pending motions for summary judgment are not in dispute.

Essex County's motion is made in lieu of an answer, and although Essex County does not set forth a standard in its papers, the grounds it cites for dismissal comport with a motion made pursuant to Rule 12(b)(6), Fed.R.Civ.P. The bases for dismissal advanced by Essex County include that the Port

Authority has no right of contribution on a § 1983 action, that the Eleventh Amendment and absolute immunity bar monetary claims against Essex County Prosecutor?s Office, and that no Eighth Amendment claim is properly pled. None of these arguments require the Court to look further than the pleadings, and, accordingly, the Court will treat Essex County's motion as being made under Rule 12(b)(6).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts that raise a right to relief above the speculative level. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Although a court must accept as true all allegations in the complaint and view them in the light most favorable to the plaintiff, Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir.2008), the court need not accept sweeping legal conclusions that are framed as factual allegations, unwarranted inferences, or unsupported conclusions. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir.1997). A plaintiff must allege sufficient facts to show that the legal allegations are not just possible, but also are plausible. Phillips, 515 F.3d at 234. According to the Third Circuit, Rule 12(b)(6) "requires not merely a short and plain statement, but instead mandates a statement showing that the pleader is entitled to relief," meaning "there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation." Id. at 234-35.

III. ANALYSIS

A. Probable Cause

Port Authority defendants' principal arguments are that Revell's § 1983 claim must be dismissed because there was probable cause for Revell's arrest, and, in any event, that Erickson is protected by qualified immunity because his actions were objectively reasonable.

Port Authority defendants' "motion is based on the probable cause [issue] for the arrest of Mr. Revell in light of the facts and circumstances presented to the arresting police officers who questioned Mr. Revell regarding hi s authority to possess and carry the hand gun in his luggage." (Port Auth. Br. 1.) Revell agrees with the centrality of probable cause, stating "the issue for this motion is whether Defendants had probable cause to arrest Revell." (Revell Br. 6.)

Revell's complaint alleges that he "was entitled to transport a firearm and ammunition through New Jersey, notwithstanding N.J.S. § 2C:39-5(b) and N.J.S. § 2C:39-3(f)" because his travel was protected under 18 U.S.C. § 926A. (Am.Compl.¶¶ 29-30.) Revell alleges that his arrest and the seizure of his property at Newark Airport were unreasonable, thereby violating the Fourth and Fourteenth Amendments to the U.S. Constitution.

The statute upon which Revell relies, 18 U.S.C. § 926A, provides:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter [18 USC §§ 921 et seq.] from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A.

Revell argues that § 926A shielded him from criminal liability under N.J.S. § 2C:39-5(b) for possession of an unlicensed handgun, which provides in pertinent part: "Any person who knowingly has in his possession any handgun ... without first having obtained a permit to carry the same as provided in N.J.S. 2C:58-4, is guilty of a crime[.]" Revell likewise

argues that § 926A insulates his possession of hollow nose ammunition from prosecution under N.J.S. § 2C:39-3(f), which provides: "Any person, other than a law enforcement officer or persons engaged in activities pursuant to subsection f. of N.J.S. 2C:39-6, who knowingly has in his possession any hollow nose or dum-dum bullet ... is guilty of a crime[.]" As the parties have correctly posited, *see supra*, the Court must determine whether Officer Erickson had probable cause to arrest Revell based upon the information known to Erickson during their encounter at Newark Airport.[3]

"Probable cause exists where the facts and circumstances within the arresting officer?s knowledge are sufficient to warrant a reasonable person to believe an offense had been committed [by the suspect in question]." *United States v. Goode*, 2009 U.S.App. LEXIS 2471, *8 (3d Cir. Feb. 9, 2009) (quoting *United States v. McGlory*, 968 F.2d 309, 342 (3d Cir.1992)). "[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual

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[3] Given the nature of the police encounter-in which Revell was passing through a security checkpoint in an airport-Revell cannot contend that Erickson should not have stopped him or that Erickson's questioning of him offends the Fourth Amendment. See *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968) (noting that police officers may investigate without offending the Fourth Amendment), see also *United States v. Hartwell*, 436 F.3d 174, 179 (3d Cir.2006) (quoting *Singleton v. Comm'r*, 606 F.2d 50, 52 (3d Cir 1979) ("The government unquestionably has the most compelling reasons[-]the safety of hundreds of lives and millions of dollars worth of private property[-]for subjecting airline passengers to a search for weapons or explosives that could be used to hijack an airplane.").

contexts-not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Probable cause is a "common-sense standard" wherein the belief of a "man of reasonable caution ... does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983). As is the case here, where "facts are not in dispute, the presence or absence of 'probable cause' has long been acknowledged to be a question of law." *Wyatt v. Cole*, 504 U.S. 158, 178 (1992).

Port Authority defendants contend that, with regard to the facts known by Erickson, probable cause existed for Revell's arrest for illegally possessing a .45 caliber handgun and hollow-nose bullets in violation of New Jersey law. Port Authority defendants submit that the indicia leading Erickson to a determination of probable cause included: Revell's failure to respond to questions regarding the legality of Revell carrying a handgun in Pennsylvania (his final destination); the overnight break in Revell's airline travel during which his luggage was accessible to him at the Sheraton hotel; and Revell's statement that he planned to use the handgun for "personal protection" while traveling.

The Port Authority defendants' most persuasive argument that Erickson had probable cause to arrest Revell is that Erickson grew suspicious that Revell's conduct fell outside of the protective ambit of 18 U.S.C. § 926A because he left the airport with the luggage for an overnight stay at a Newark hotel. The record supports defendants' assertion that Erickson was concerned that Revell had ready access to the firearm

and ammunition during the preceding night, which meant Revell would be in violation of at least two New Jersey Statutes. From Erickson's deposition testimony it is clear he knew that Revell spent the night with his luggage (containing the handgun and ammunition) in a Newark hotel.

> Q. He told you that he picked up the bag at Newark because he missed his flight, and went of the airport, correct?
>
> A. Yes.
>
> Q. And did he tell you that he went to a hotel that night?
>
> A. Yes.

(Erickson Dep. Trans. 65:13-20.) Erickson testified that he believed he had probable cause notwithstanding § 926A due to Revell's possession of hollow-nose ammunition: "The fact that he had the hollow-nosed bullets, and the circumstances that he had, we had to believe that he had the weapon readily available to him, you know, overnight in the hotel. All of these circumstances lead us to believe we have enough probable cause." (Erickson Dep. Trans. 72:15-22.)

Revell's arguments on this point attempt to reframe the dispute into whether Erickson knew "what, if anything, Revell did with his bag when he went to the hotel." (Revell Br. 17.) Revell counters that his pleadings indicate that he "did not open either of

the locked hard case containers while he was in New Jersey" (*id.* (quoting Am. Compl. ¶ 13)), and, argues that Erickson had "no basis to conclude that Revell's firearm was 'readily accessible' to him." (Id.) Revell chooses to focus on Erickson's questions as to where Revell intended to use the handgun for protection, arguing that the correct answers would not have suggested the handgun was readily accessible during the trip to New Jersey. But this ignores the fact that the handgun was accessible to Revell from the time he left Newark Airport after the cancellation of his flight to the time he returned the next day. Revell's unsupported assertion that he did not open the gun or ammunition containers in New Jersey is irrelevant to whether Erickson had probable cause to suspect the weapon and bullets were readily accessible. Moreover, nothing in the pleadings or the record indicates that Revell's handgun and ammunition were anything but readily accessible to him during his overnight stay in New Jersey. Revell does not allege, for instance, that the keys to his locked hard cases were held by Port Authority Police, or that the cases were held in safekeeping by TSA or Port Authority officials overnight.

In addition, Erickson was not constrained to believe Revell's responses to his questions during their airport encounter, especially because Revell's responses did not satisfy Erickson?s suspicion as to whether laws had been violated. In *Torraco v. Port Authority of New York & New Jersey*, 539 F.Supp.2d 632 (E.D.N.Y.2008), the court considered questioning by an airport police officer of an individual transporting a handgun who claimed the protection of

§ 926A. The court concluded that "[a] reasonable officer, even one aware of *§ 926A*, would be fully justified in not accepting plaintiff's explanation at face value. This is because *§ 926A* itself does not answer the question; it requires confirmation of a particular set of facts, which a police officer is not obligated to accept from the mouth of the suspect." *Id.* at 650.

Moreover, § 926A does not address anything but vehicular travel; it does not encompass keeping the weapon-locked in a case or not-in an airport hotel overnight. For that reason, Revell's amendment to his complaint wherein he asserts that his encased handgun and ammunition were transported from Newark Airport to the Sheraton in a van's inaccessible cargo area is without force for purposes of the probable cause analysis. It may very well be that Revell could not access his luggage during his ride in the shuttle van-but he assuredly could have later, when it was with him during his hotel stay.

Revell also attempts to draw on inapposite Supreme Court precedent arising from enforcement of the Civil Rights Act of 1964 to show that his stay at the hotel did not constitute a "break in travel." To support his point, Revell cites *Atlanta Motel v. United States*, 379 U.S. 241 (1964), which stands for the proposition that a hotel can be regulated as part of interstate commerce under the Commerce Clause. To apply the *Atlanta Motel* precedent to the § 926A framework, as Revell suggests, would stretch § 926 too thin. Section 926A plainly discusses the transportation of firearms through a state; it does not contemplate a firearm transporter staying for any period of time in a

state with an unlicensed firearm in luggage within that transporter?s unsupervised possession.

Even if Erickson's understanding of any of the facts was mistaken, however, the probable cause he developed to arrest Revell is not diminished, as "[p]robable cause does not demand any showing that a good-faith belief be correct, or more likely true than false." *Torraco*, 539 F.Supp.2d at 647.

The Court finds as a matter of law that Port Authority defendants' arrest of Revell does not offend the Fourth Amendment because probable cause developed during the arresting officer's questioning concerning Revell's transportation of a handgun and ammunition through New Jersey. This ruling makes it unnecessary for the Court to address whether or not § 926A pre-empts New Jersey's ban on possession of hollow point bullets.

B. Qualified Immunity

The Port Authority defendants also argue that Erickson is entitled to qualified immunity as a matter of law in arresting Revell because his actions did not offend the Constitution and were not objectively unreasonable. Although the Court has determined probable cause existed to arrest Revell, the question of qualified immunity will also be determined as an alternative ground for the Court's decision.

"[A]ny claim of qualified immunity must be resolved at the earliest possible stage of litigation." *Miller v. Clinton County*, 544 F.3d 542, 547 (3d

Cir.2008). Under the doctrine of qualified immunity, officers performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity analysis is a two-pronged test. A court must first ask whether the facts alleged, viewed in the light most favorable to the party asserting the injury, show that the officer's conduct violated a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Then, only if the court answers the threshold question affirmatively should it proceed to the second prong and determine whether the right was clearly established, i.e., "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* Thus, the Court must first determine whether a constitutional infringement has been satisfactorily alleged to create a genuine issue of material fact.

The Port Authority defendants "are entitled to qualified immunity here if a reasonable officer could have believed that probable cause existed to arrest [defendant] in light of clearly established law and the information the arresting officers possessed." *Blaylock v. City of Philadelphia*, 504 F.3d 405, 411 (3d Cir.2007) (internal citation and quotation omitted). Here, Erickson demonstrated awareness of the clearly established New Jersey statutes prohibiting unlicensed handguns and hollow-nose ammunition during the airport encounter. Further, although Erickson did not possess full information about Revell's planned driving route from Pennsylvania to

Utah (*i.e.* the states through which Revell planned to drive), Erickson did learn of Revell's plans to use the gun for "protection" and that Revell had left the airport on the previous night with the unlicensed handgun and ammunition. Because, "in a qualified immunity case, the question of probable cause to arrest is an objective inquiry that does not depend on the officers' subjective motivations," the inquiry can end there. See *Blaylock*, 504 F.3d at 411 n. 5. Thus, by virtue of Erickson having probable cause to arrest Revell, Erickson is entitled to qualified immunity and the Court need not reach the second prong.

C. Due Process Claim Against Port Authority Under § 1983

Count Two of the amended complaint addresses the adequacy of the Port Authority?s post-deprivation due process, seeking damages for "depriv[ing] Revell of property without due process of law pursuant to the established policy of Defendant Port Authority[.]" (Am.Compl.¶ 39.) Thus, Revell is seeking damages for the taking of his property during the arrest and failing to return it. In his amended complaint, Revell had also sought injunctive relief ordering that his seized property be returned to him, but voluntarily dismissed Count Three for injunctive relief on July 24, 2008 after Port Authority returned his gun, ammunition, and holster. (D.E. 101.)

That the seizure of Revell's weapon, ammunition, and holster took place in the context of an arrest means that Revell is entitled to post-deprivation procedures to satisfy due process.

Where, as here, the necessity of quick action makes a pre-deprivation remedy impracticable, the Due Process Clause requires only that States provide an adequate post-deprivation remedy. *Parratt v. Taylor*, 451 U.S. 527, 539-41 (1981). As the Court previously ruled in its June 29, 2007 opinion, in cases of random or unauthorized deprivations, the availability of a State law tort action against the rogue State officer in State court qualifies as an adequate post-deprivation remedy. (D.E.38); see also *Parratt*, 451 U.S. at 543.

Revell argues that the option of requesting that Essex County release his property was not an adequate post-deprivation remedy because it was not a statutorily-created means of redress. (Revell Br. 28.) Interestingly, it appears that such a simple request to Essex County is precisely what led to the return of Revell's seized property. Critically for purposes of Count Two, however, Revell did not file a state court tort suit for return of his seized property. Revell cannot recover for inadequacy of post-deprivation remedies because the option of commencing a state court lawsuit was available to him at all times, which satisfies Revell's right to due process. Accordingly, the Court grants summary judgment of dismissal as to Count Two.

D. "Prison Claim"

Revell clarifies in his papers that he is not alleging a "prison claim" under the Eighth Amendment, but only seeks to "recover against the Port Authority for injuries suffered at the Essex County Jail as part of his compensation for the arrest."

(Revell Br. 32.) Without commenting on the availability of damages on this theory, the Court has found that probable cause existed for Revell's arrest. As such, he is not entitled for damages related to his detention at Essex County Jail.

E. The Remaining Motions

Because the Court grants Port Authority defendants' motion for summary judgment, it need not decide third-party defendant Essex County's motion to dismiss in lieu of answering and third-party defendant Continental's motion for summary judgment, and they are both denied as moot. All third-party claims are dismissed as moot.

IV. CONCLUSION

For the foregoing reasons, Count One of Revell's complaint is dismissed because probable cause existed for Revell's arrest. Revell's only remaining claim, Count Two, is likewise dismissed because New Jersey afforded adequate post-deprivation due process to Revell. The motions of Essex County and Continental are denied as moot, as there is no liability for the actions of the Port Authority defendants, and all third-party claims are, accordingly, dismissed. An appropriate order will be entered.

/s/ Katherine S. Hayden
Katherine S. Hayden, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GREGG C. REVELL,

Plaintiff,

v.

Civ. Action
No. 06-402 (KSH)

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and SCOTT ERICKSON,

Defendants and Third-Party Plaintiff

ORDER

v.

CONTINENTAL AIRLINES, THE COUNTY OF ESSEX, THE ESSEX COUNTY JAIL, THE OFFICE OF THE ESSEX COUNTY PROSECUTOR et al.

Third-Party Defendants.

Katherine S. Hayden, U.S.D.J.

For the reasons stated in the opinion filed herewith,

IT IS on this 31st day of March, 2009,

ORDERED that Port Authority's cross-motion for summary judgment is granted (D.E. 93), dismissing the remaining counts, counts one and two, of Revell's complaint; and it is further

ORDERED that the motions of Essex County (D.E. 92) and Continental (D.E. 97, 106) are denied as moot; and it is further

ORDERED that the Clerk of Court shall mark the matter closed.

/s/ Katherine S. Hayden
Katherine S. Hayden, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

GREGG C. REVELL and
ASSOCIATION
OF NEW JERSEY
RIFLE AND PISTOL
CLUBS, INC.,

Plaintiffs,

v.

Civil Action
No. 06-402 (KSH)

PORT AUTHORITY OF
NEW YORK AND NEW
JERSEY, et al.,

Defendants.

OPINION

KATHARINE S. HAYDEN, U.S.D.J.

In this § 1983 case, Plaintiff Gregg Revell ("Revell") claims that Port Authority Police Officer Scott Erickson ("Erickson") and the Port Authority of New York and New Jersey ("the Port Authority") violated his rights, privileges, or immunities secured by 18 U.S.C. § 926A when Erickson arrested him in Newark Liberty International Airport in Newark, New

Jersey for possession of a firearm without a license and for possession of hollow point bullets. Revell also claims that Erickson and the Port Authority violated his Fourteenth Amendment right to due process of law by retaining, without providing notice and an opportunity to be heard, the firearm, holster, locks, hard case containers and ammunition seized from him during the arrest. Revell seeks both monetary and injunctive relief. Plaintiff Association of New Jersey Rifle and Pistol Clubs, Inc. (the "Association"), a non-profit membership corporation organized to protect the rights of its members and the public to possess and carry firearms and ammunition, seeks purely injunctive relief in the form of an order enjoining Erickson and the Port Authority from enforcing certain New Jersey gun laws against non-resident Association members who are transporting firearms and ammunition through New Jersey in compliance with § 926A.

Erickson and the Port Authority have moved to dismiss the complaint on several grounds. For the reasons explained more fully below, the motion is **granted**, and Revell is given leave to amend Counts One, Two, and Three of the complaint.

I. STANDARD

Erickson and the Port Authority filed a joint motion for dismissal.[1] Revell's complaint can only be

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[1] Technically, because the Port Authority filed a responsive pleading prior to filing this motion and Erickson did not, they have filed for dismissal under different rules of

dismissed "if it appears to a certainty that no relief could be granted under any set of facts which could be proved." D.P. Enters., Inc. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir.1984). Moreover, the court must accept all well-pled factual allegations as true and must construe the complaint in the light most favorable to the plaintiff. Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir.1998).

II. FACTUAL BACKGROUND[2]

On March 31, 2005, Revell, a resident of Utah, checked in with Northwest Airlines at the Salt Lake City Airport. His destination was Allentown, Pennsylvania, via Minneapolis/St. Paul and Newark, New Jersey. When he checked in, Revell declared that his bag contained an unloaded firearm in a locked hard case container and ammunition in a separate locked hard case container. Revell signed an orange firearm declaration tag, which was placed inside the container holding the firearm.

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procedure. Fed.R.Civ.P. 12(b)(6) authorizes a defendant to file a pre-answer motion to dismiss for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(c), on the other hand, permits a defendant who has already filed an answer to file a motion for judgment on the pleadings. As a result, the Port Authority's motion is made pursuant to Rule 12(c), while Erickson's motion is made pursuant to Rule 12(b)(6) The difference is purely semantic, however, because the standard is the same for both rules. Turbe v. Government of the Virgin Islands, 938 F.2d 427, 428 (3d Cir.1991).

[2] The factual background comes from the complaint.

Revell's flight to Newark was late and he missed his connecting flight to Allentown. After waiting five hours inside the secure area of the airport, he was directed to board a bus that would drive him and other passengers to Allentown. After taking his seat on the bus, Revell learned from the driver that his checked luggage had not been placed on the bus, so he got off to search for his bag. By the time Revell found it in the lost luggage area of Newark Airport, the bus to Allentown had already left. An airline employee told him that the airline's computer system showed that although he had checked the bag through to Allentown, the airline had mistakenly tagged his bag with Newark as its final destination. As there were no other connections to Allentown that night, Revell took his bag and stayed overnight at a nearby hotel.

The next morning, Revell went directly to Newark Airport. At the airline check-in counter, he once again declared that he had a firearm and ammunition in his bag and that they were stored in separate locked hard case containers. Revell signed a white form and was directed to an x-ray area, where he again declared the firearm and ammunition. After his bag went through the x-ray machine, an agent at the end of the machine opened the cases using Revell's key. The orange firearm declaration from Revell's Salt Lake City check-in was still in the firearm container. After approximately 20 minutes, several police officers escorted Revell to a different area of the airport where they questioned him about the firearm and ammunition. Revell showed them his Utah concealed firearm permit and driver's license, and explained that he was simply traveling through New Jersey from

Utah and that he was on his way to Pennsylvania.

It is unclear exactly when Officer Scott Erickson appeared on the scene, but he ultimately arrested Revell for possession of a handgun without a permit in violation of N.J.S.A. § 2C:39-5(b) and for possession of hollow point ammunition in violation of N.J.S.A. § 2C:39-3(f). Revell's firearm, ammunition, holster, locks, and hard case containers were seized, and he was charged with unlawful possession of a handgun without a permit and unlawful possession of hollow point ammunition. He was handcuffed, placed in a police car, and held overnight in the Port Authority jail. The next day, Revell was transported to the Essex County Jail, where he was detained for three days. Ultimately, some four months later, on August 2, 2005, the Essex County Prosecutor administratively dismissed all charges. As of the date of filing the complaint, the firearm, ammunition, holster, locks, and hard case containers had not been returned.

The complaint includes four counts brought pursuant to 42 U.S.C. § 1983. In Count One, Revell claims that he is entitled to $3 million in damages because Erickson and the Port Authority, acting under color of State law, deprived him of his federal right to transport firearms and ammunition through states where possession of such items might otherwise be illegal, as guaranteed by 18 U.S.C. § 926A. In Count Two, Revell claims that he is entitled to $100,000 in damages because Erickson and the Port Authority, acting under color of State law, deprived him of his property without due process of law as guaranteed by the Fourteenth Amendment to the United States

Constitution. In Count Three, Revell seeks injunctive relief in the form of an order directing Erickson and the Port Authority to return his property. In Count Four, the Association seeks an injunction enjoining Erickson and the Port Authority from enforcing N.J.S.A. §§ 2C:39-5(b) and 2C:39-3(f) against its non-resident members who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A.

III. ANALYSIS

Revell seeks to recover monetary damages and injunctive relief pursuant to 42 U.S.C. § 1983 for a violation of a statutory right secured by 18 U.S.C. § 926A[3] and for violation of his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution. To properly assert a § 1983 claim, the complaint must allege (1) "a violation of a right secured by the Constitution or laws of the United States," and (2) "that the alleged deprivation was committed by a "person" acting under color of State law." West v. Atkins, 487 U.S. 42, 48 (1988).

A. Count One-Does § 1983 provide Revell a remedy for a violation of 18 U.S.C. § 926A?

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[3] Revell's brief in opposition to the motion to dismiss specifies that he is not suing for a violation of his Fourth Amendment right to be free from unreasonable searches and seizures "Indeed, the Fourth Amendment is not even mentioned in the complaint. Rather, Revell seeks to recover under 42 U S.C Section 1983 for violation of a statutory right secured by 18 U S C. § 926A . " (Pl.'s Br. at 1)

It is well-settled that violation of a federal statute by a person acting under color of State law is insufficient, on its own, to support an action under § 1983. Blessing v. Freestone, 520 U .S. 329, 340 (1997); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105-106 (1989). Such a lawsuit is only permissible if (1) the statute creates enforceable rights, privileges, or immunities; and (2) Congress has not, either expressly or impliedly, foreclosed a private remedy. Three Rivers Ctr. for Indep. Living v. Hous. Auth., 382 F.3d 412, 421-22 (3d Cir.2004). As a threshold jurisdictional matter, the Court must determine whether 18 U.S.C. § 926A created an enforceable personal right. This appears to be an issue of first impression.

Whether § 1983 provides a remedy for violation of a federal statute, is a separate, but overlapping, inquiry from whether the statute creates an implied private right of action. Three Rivers Ctr. for Indep. Living, 382 F.3d at 421. The Supreme Court has instructed that four factors must be considered in determining whether a federal statute provides a private right of action:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted-that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative

> scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cannon v. University of Chicago, 441 U.S. 677, 689 n. 9 (1979) (internal citations and quotations omitted). However, because § 1983 by its very terms provides a private remedy, the analysis for determining whether an individual may sue for violation of a federal statute pursuant to § 1983 is slightly different. Three Rivers Ctr. for Indep. Living, 382 F.3d at 421.

> The threshold question remains, however, whether the federal statute creates a personal right-i.e., a plaintiff must show that the statute creates enforceable rights, privileges, or immunities within the meaning of § 1983. Once the plaintiff establishes the existence of a federal right, there arises a rebuttable presumption that the right is enforceable through the remedy of § 1983. This presumption may be rebutted by showing that Congress specifically foreclosed a remedy under § 1983, either expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.

Id. at 421-22 (internal citations and quotations omitted).

The federal statute involved here, 18 U.S.C. § 926A, states in relevant part:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person ... shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, that in the case of a vehicle without a compartment separate from the driver's compartment the firearm and ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A (2006). The statute was enacted in 1986 as part of the Firearms Owners Protection Act ("FOPA") to enable individuals to transport firearms through a State, even if possession of the firearm in that State would otherwise be illegal.

FOPA was a comprehensive statute that attempted to fix perceived problems with the Gun Control Act of 1968. During a debate on the Senate floor over the bill, Senator Bob Dole stated:

> The Firearms Owners Protection Act would correct various abuses which have occurred under the Gun Control Act of 1968. The 1968 law was passed during an emotional period, when the Nation was reacting to two political assassinations. The national judgment at that time was to take away rights enjoyed by many in order to prevent a recurrence of the outrageous abuses of a few. Each year's experience under the law brought with it new evidence that Congress had gone too far. Hunters, [s]portsmen, hobbyists, and collectors were being prosecuted for technical violations, diverting limited law enforcement resources from the pursuit of those guilty of truly criminal firearms use.
>
> S. 49 [FOPA] is the culmination of 7 years of painstaking debate and analysis over the deficiencies in the 1968 law and how they can be best corrected.

132 Cong. Rec. S5358-04 (daily ed. May 6, 1986).

When the bill was first circulated, FOPA caused serious concern among the law enforcement community. Had FOPA been passed in its original

form, the "legislation would [have] exempt[ed] the transport of firearms in interstate commerce from any State or local laws that might otherwise make such transport illegal, thereby overriding States' rights to regulate gun carrying across their borders, and allowing criminals the opportunity to transport their weapons across State lines with impunity." Id. (statement of Sen. Daniel Patrick Moynihan). To allay these concerns, Senator Strom Thurmond proposed the statute that was ultimately passed, known colloquially as both the "Thurmond Amendment" and "Son of Gun." The new language closed the loophole by limiting the right to travel interstate with firearms to situations where the firearm was unloaded, the firearm was not readily accessible, and any ammunition was stored separately.

During debate, Senator Jim McClure discussed the need for law abiding individuals to travel interstate with their firearms:

> I believe that the Second Amendment means exactly what it says. I believe that our forefathers intended for all honest citizens to be able to arm themselves. This is not a privilege meted out by the Government-it is a sovereign right, belonging to the people themselves.... Under present law, there is no legal way for a person to transport firearms through some States. For example, a hunter from South Carolina has no way of getting through the State of New York to go moose hunting in Maine. The

> Firearm Owners Protection Act would allow an individual to transport a firearm through the State if the firearm is unloaded and not easily accessible. The possession of the firearm must be legal both in the State of residence and in the State of final destination.... This right of transportation does not hinder a State from enacting laws concerning intrastate transportation.... Each year thousands of law abiding citizens travel on interstate trips with firearms for hunting purposes, competitions, matches, moving residences, and personal protection upon arrival. There must be some way for law-abiding Americans to exercise the right to interstate travel with personally owned firearms.

132 Cong. Rec. S5358-04 (daily ed. May 6, 1986) (emphases added). Speaking out in favor of the proposed bill on the House floor, Representative Bill McCollum described § 926A as a "safe harbor" provision, rather than as a statute creating an affirmative right. 132 Cong. Rec. H4102-03 (daily ed. June 24, 1986). He noted:

> No one is required to follow the procedures set forth in section 926A, but any traveler who does cannot be convicted of violating a more restrictive State or local law in any jurisdiction through which he travels. Thus, section 926A will be valuable to the person who

> either knows he will be traveling through a jurisdiction with restrictive laws or is unfamiliar with the various laws of the jurisdiction he will be traversing.
>
> Many times people traveling in interstate commerce can unwittingly find themselves in violation of all kinds of technical requirements for possession of firearms.

Id.

The legislative history shows that the statute was passed as a compromise that balanced the needs of certain individuals to travel across state lines with firearms with the needs of States to keep illegal guns out of the hands of criminals. Effectively, Congress passed a statute, codified as § 926A, that trumps State gun laws under limited circumstances, but that does not preempt all State regulation of firearms, City of Camden v. Beretta U.S.A. Corp., 81 F.Supp.2d 541, 549 (D.N.J.2000) (Simandle, J.), leaving the States with the power to regulate firearms and to prosecute individuals who violate State gun laws. Section 926A, therefore, places police officers in the unenviable position of having to determine in the first instance whether an individual should be arrested for violation of a State gun law, or whether the individual's actions are immunized by compliance with § 926A.

Revell's lawsuit presents a situation where an individual has complied with the requirements of § 926A and is nonetheless arrested for violation of an

otherwise valid State gun law. Arguably, there is a violation of § 926A if he has complied with § 926A and is nonetheless detained by the police and/or arrested, and/or if the firearms are seized. But the § 926A violation is a subsection of the main event: seizures that are arguably "unreasonable" have occurred, and this necessarily directs a Fourth Amendment analysis to determine if he was stripped of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Revell seeks a statutory route toward relief, but inescapably, the legal inquiry draws on established legal principles of constitutional law enforcement activity. Thus: "[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152 (2004) (citing United States v. Watson, 423 U.S. 411, 417-24 (1976); Brinegar v. United States, 338 U.S. 160, 175-76 (1949)). If a law enforcement officer arrests an individual without probable cause, the officer may be liable under § 1983. Atwater v. City of Lago Vista, 532 U.S. 318 (2001). Furthermore, the filing of criminal charges against an individual without probable cause is also actionable under § 1983. Lohman v. Twp. of Oxford, 816 F.Supp. 1025 (E.D.Pa.1993).

The Supreme Court has specifically held that all § 1983 claims alleging an unlawful seizure must be brought pursuant to the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that

"[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment ... must be the guide for analyzing these claims"). While the FOPA provision at issue in this case might be properly considered as a factor weighing on reasonableness, it does not provide greater protection from arrest than the Fourth Amendment already provides, nor under the strictures of Graham v. O'Connor, may it substitute for Fourth Amendment analysis.

By passing § 926A, Congress was attempting to protect law abiding gun owners from prosecution without diluting the States' abilities to prosecute criminals using guns for illicit purposes. Because individuals already have a method of recovering damages pursuant to § 1983 if they are arrested or charged without probable cause, it is unnecessary and, indeed, improper for this Court to conclude that § 1983 provides a separate or alternative remedy for a violation of § 926A. Subjecting law enforcement officers to § 1983 liability for unlawful arrests over and above the Fourth Amendment's reasonableness inquiry risks an impact on the enforcement of a given State's gun laws, something that motivated Congress's insistence on the Thurmond Amendment in the first place.

Revell carefully drafted his complaint to avoid mention of the Fourth Amendment, and specifically points out in his brief that he is <u>not</u> raising a Fourth Amendment claim. But he is seeking to recover damages for the unconstitutional seizure of his person

and his firearm under circumstances that require a classic reasonableness analysis. Nothing in the statute or legislative history would support a finding by this Court that by passing the FOPA provision at issue, Congress intended to provide firearms-transporting individuals with separate protection against arrest and seizure of property from what the Fourth Amendment already provides. Therefore, Count One of Revell's complaint is **dismissed**.

Because, as the foregoing analysis indicates, the facts alleged could be sufficient to state a § 1983 claim for an unreasonable arrest and seizure of property in violation of the Fourth Amendment, Revell is granted 20 days leave to file an amended complaint.

B. Counts Two and Three-Due Process Claims

In Counts Two and Three, Revell claims that defendants, acting under color of State law, have deprived him of his property (firearm, ammunition, holster, locks, and hard case containers), without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. The complaint states: "Defendants ... deprived Revell of property without due process of law by retaining, without notice and opportunity for a hearing, the firearm, holster, locks, hard case containers, and ammunition seized from him." (Compl. at ¶¶ 36, 43.) Both counts are brought pursuant to § 1983, the only difference being that Revell seeks monetary damages in Count Two and injunctive relief in Count Three.

The most natural reading of the complaint is

that Revell is asserting a procedural due process claim based on defendants' failure to return his firearm, ammunition, holster, locks, and hard case containers to him. However, because Revell does not explicitly state whether his due process claim is of the procedural or substantive variety, the Court will analyze his claim as if he has asserted both.

1. Procedural Due Process

Under the Fourteenth Amendment, a State may not "deprive any person of life, liberty, or property, without due process of law." A procedural due process claim is analyzed under a two-part inquiry: the Court must determine whether Revell "was deprived of a protected interest, and if so, what process was his due." Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). The second prong bars a § 1983 suit if a constitutionally adequate State process was available but not used. Parratt v. Taylor, 451 U.S. 527, 541-42 (1981).

The Supreme Court explained in Board of Regents v. Roth, 408 U.S. 564, 577 (1972), that property interests "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." It is not disputed that Revell enjoyed a property interest in items seized and subsequently retained by defendants, so the issue is what process he was due.

"Usually, the process that is constitutionally 'due' must be afforded before the deprivation

occurs-the state must provide predeprivation process." Brown v. Muhlenberg Twp., 269 F.3d 205, 213 (3d Cir.2001). However, when deprivation by a State official acting under color of law is "random and unauthorized" or if the necessity of quick action makes a predeprivation remedy impracticable, as is the case here, the Due Process Clause requires only that States provide an adequate postdeprivation remedy. Parratt, 451 U.S. at 539-41. In cases of random or unauthorized deprivations, the availability of a State law tort action against the rogue State officer in State court qualifies as an adequate postdeprivation remedy. Id. at 543.

While Revell has alleged that the Port Authority has a policy of arresting individuals in violation of 18 U.S.C. § 926A (Compl. at ¶ 17), he has not alleged that the Port Authority's postdeprivation remedies to recover a firearm seized during the course of an arrest are constitutionally inadequate. Revell also does not indicate whether or not he has availed himself of the Port Authority's remedies for the recovery of seized property or why these remedies are constitutionally inadequate. He simply claims that his "requests for return of the property have been ignored." (Compl. at ¶ 22.) To the extent that Revell has not availed himself of the Port Authority's formal procedures for requesting the return of seized property, his procedural due process claim must be dismissed for failure to state a claim because he has not shown that complying with the procedures would be futile. Insofar as Revell claims that Erickson's retention of his property is a random and unauthorized act and that Erickson is wrongly holding his property in violation of official Port Authority policy, this claim must also be

dismissed because Revell is capable of filing a State law tort action against Erickson in State court seeking the return of his property. Parratt, 451 U.S. at 543 (holding that in cases of random and unauthorized deprivations, the availability of a State law tort action in State court qualifies as an adequate postdeprivation remedy).

2. Substantive Due Process

To the extent that Revell is claiming that his arrest and the seizure of his property should be analyzed under a substantive due process standard, such a claim is foreclosed by the Supreme Court's decision in Graham v. Connor, 490 U.S. 386, 388 (1989). As noted above, the Graham Court held that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Id. at 395.

For the foregoing reasons, Counts Two and Three are **dismissed** for failure to state a claim. Revell is granted leave to file an amended complaint within 20 days if he wishes to pursue a claim alleging that the Port Authority's postdeprivation remedies for the return of seized property are constitutionally inadequate.

C. Count Four-Injunctive Relief for the Association

In Count Four, the Association seeks an

injunction enjoining defendants from enforcing N.J.S.A. §§ 2C:39-5(b) (possession of a handgun without a permit) and 2C:39-3(f) (possession of hollow point ammunition) against its non-resident members who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A.

Defendants have not raised any arguments in support of dismissing this claim. However,

> those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy. Plaintiffs must demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for proper resolution of constitutional questions. Abstract injury is not enough. The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.

City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983) (internal citations and quotations omitted).

In Lyons, the Court held that an individual who

was severely injured by the police after they subjected him to a choke hold during a traffic stop did not have standing to seek an injunction preventing the police from using the choke hold in the future. Id. at 105. In so holding, the Court stated that although

> Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between the parties.

Id.

Under this standard, the Association does not meet Article III's injury in fact requirement to establish an actual case or controversy. Although the complaint summarily asserts that there "exists a credible threat of prosecution for violation ... [of these laws] for non-resident members of the Association who

intend to transport firearms and hollow point ammunition through New Jersey" pursuant to 18 U.S.C. § 926A," (Compl. at ¶ 52), the Association has failed to plead any fact in support. Because the Association cannot show a sufficient likelihood that its members will be injured in the future, its claim must be **dismissed** for failure to establish a case or controversy between the parties. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lyons, 461 U.S. at 105.

IV. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is **granted**. Revell is granted leave to amend **Count One** to substitute a § 1983 claim for a violation of his Fourth Amendment rights in place of his § 1983 claim for a violation of 18 U.S.C. § 926A; and Revell is also granted leave to amend his complaint as to **Counts Two** and **Three** insofar as he wishes to claim that the Port Authority's postdeprivation remedies for property seized in connection with his arrest are constitutionally inadequate. An appropriate order will be filed.

Dated: June 29, 2007

/s/ Katherine S. Hayden
Katherine S. Hayden, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2029

GREGG C. REVELL; ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS INC.

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY; SCOTT ERICKSON

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Third Party Plaintiff

v.

CONTINENTAL AIRLINES; COUNTY OF ESSEX; ESSEX COUNTY JAIL; ESSEX COUNTY PROSECUTOR; JOHN DOES 1-10,

Third Party Defendants

Gregg C. Revell,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 06-cv-402)
District Judge: Honorable Katherine S. Hayden

SUR PETITION FOR REHEARING

Before: RENDELL and JORDAN, *Circuit Judges*, and PADOVA*, *District Court Senior Judge*

The petition for panel rehearing filed by Petitioner having been submitted to all judges who participated in the decision of this court, and a majority of the judges who concurred in the decision not having asked for rehearing, it is hereby ORDERED that the petition for panel rehearing is hereby DENIED.

BY THE COURT:
/s/ Kent A. Jordan
Circuit Judge

Dated: April 20, 2010
MB/cc: Richard E. Gardiner, Esq.
Donald F. Burke, Sr., Esq.

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* Honorable John R. Padova, United States District Court Senior Judge, for the Eastern District of Pennsylvania, sitting by designation